Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-363

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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DANIEL FOURNIER AND BARBARA FOURNIER,
*Petitioners*

v.

PETROLEUM HELICOPTERS, INC., *et al.*,
*Respondent*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Petition presents "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules for this Court to grant review on writ of certiorari, especially where the trial court's dismissal of this maritime personal injury action for petitioners' failure to establish a causal link between an incident and his alleged injuries was not contrary to any established law and the appellate court's affirmance of same was not violative of this Court's clearly erroneous standard.

2. Whether the Internal Operating Procedures of the Fifth Circuit Court of Appeals concerning rehearing en banc set forth a narrower entitlement to such a rehearing than Federal Rule of Appellate Procedure 35(a).

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 5 |
| A. There Are No "Special and Important Reasons" Under Rule 17 For Review On Writ of Certiorari Where Dismissal of Petitioners' Claims Was Not Contrary To Established Law And Affirmance Did Not Violate The Clearly Erroneous Standard | 5 |
| B. The Internal Operating Procedures of the Fifth Circuit Court of Appeal Do Not Set Forth A Narrower Entitlement to Rehearing En Banc Than Federal Rule of Appellate Procedure 35(a) | 10 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES

*Cases* Page

*Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) ..... 6
*Gilmore v. Waterman Steamship Corp.*, 790 F.2d 1244 (5th Cir. 1986) ..... 7
*Herrmann v. Nicor Marine, Inc.*, 664 F. Supp. 241 (E.D. La. 1985) ..... 5
*GHR Energy Corp. v. Crispin Company Ltd.*, 791 F.2d 1200 (5th Cir. 1986) ..... 9
*McDowell v. Safeway Stores, Inc.*, 753 F.2d 716 (8th Cir. 1985) ..... 7
*National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed. 2d 70 (1984) .... 8
*Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976) ..... 9
*Rebuck v. Vogel*, 713 F.2d 484 (8th Cir. 1983) .... 9
*Scarborough v. Kellum*, 525 F.2d 931 (5th Cir. 1976) ..... 9
*Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953) ..... 11

*Statutes*

28 U.S.C. § 1333 ..... 4

*Rules*

Fed. R. App. P. 35(a) ..... i, 5, 10, 11
Fed. R. Civ. P. 52(a) ..... 6
Local Rules of Fifth Circuit Rule 35.1 ..... 10
Internal Operating Procedure for Fifth Circuit .. i, 5, 10, 11
Supreme Court Rule 17 ..... i, 4, 5, 9

*Miscellaneous*

Restatement of Torts, Second, § 433B (1964) ..... 5

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## BRIEF IN OPPOSITION

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### STATEMENT OF THE CASE

On October 23, 1981, Daniel Fournier, petitioner herein, was a passenger aboard a helicopter operated by respondent, Petroleum Helicopters, Inc., which made an emergency landing in the Gulf of Mexico after its engine failed. Also aboard the aircraft were the pilot and a second passenger, Kerman LeBlanc. The pilot was alerted to the engine failure by the engine-out light and warning horn, and immediately entered autorotation. As explained at trial, in an autorotational landing the rotor blades are kept in motion by the air travelling upward through the blades as the aircraft descends, and the pilot has equal control over the aircraft as during powered flight. The

aircraft stabilizes when it goes into autorotation; there is no "free fall."

Petitioner has described an incident involving a free fall of a helicopter from an altitude of approximately 800 feet, a violent crash into the sea and a subsequent period of two hours aboard the aircraft during which he was constantly thrown and jerked about. However, Fournier's account differs significantly from the descriptions provided by the other two occupants. Both testified that there was no traumatic impact on landing and recited the details of a successful autorotational landing without injury to persons or damage to the helicopter. The helicopter landed level in the water undamaged, with its pontoons inflated. Even Fournier admitted that he was not aware of any injury to himself after the landing, or while awaiting rescue.

Additionally, neither LeBlanc nor the pilot characterized their wait for the rescue boat as traumatic. In fact, LeBlanc stated that he was relieved when he saw how the pilot had control of the aircraft in the seas. He further stated that he was not bothered by the rocking motion of the aircraft, and the pilot testified that the aircraft rode the seas well, moving with the waves "like a cork."

After approximately two hours, the occupants of the aircraft were taken aboard a rescue boat and transported to a hospital where petitioner was examined and released with a diagnosis of "no injuries."

Three days after the incident the petitioner visited his opthalmologist to secure a new pair of eyeglasses quickly so that he could return to work. The opthalmologist was impressed with the lack of concern that Fournier exhibited regarding the helicopter incident. Petitioner returned to work the next day and continued working through December 11, 1981, without complaints of pain to anyone, including his wife. On December 15, 1981,

petitioner made complaints of chest pain to Dr. Crenshaw, his family practitioner, but said nothing of his back, neck, or any other orthopaedic problem.

The first evidence of any orthopaedic complaints by Fournier appears in the record of his visit to his family physician on January 6, 1982, more than nine weeks after the emergency landing. At that time, Dr. Crenshaw performed an orthopaedic examination but found nothing abnormal. Subsequent visits to another general practitioner and an orthopaedist revealed no orthopaedic or neurological abnormalities.

Unhappy with this orthopaedist's findings, petitioner's attorney advised him to schedule an appointment with Dr. John Watermeier who, like the other physicians of petitioner's choosing, found no objective evidence of any abnormality during petitioner's first three visits. Despite the fact that Dr. Watermeier's own clinical evaluations failed to produce any objective evidence of an invertebral disc problem, that EMG and myelogram test results were negative, and that radiculogram results were at best "suspicious," on February 19, 1982, approximately three weeks after his first meeting with Fournier, Dr. Watermeier performed surgery. "For reasons never satisfactorily explained to the [trial court], Dr. Watermeier deemed this surgery appropriate." (Trial Court's Memorandum Opinion, p. 5.)

In January, 1983, based on similarly suspect symtoms, Dr. Watermeier performed an anterior cervical fusion. This surgery was followed by a repeat lumbar laminectomy, discectomy and fusion of petitioner's lower back in May, 1983, and a second anterior cervical fusion in May, 1985. In March, 1986, petitioner once again underwent surgery, this time a lumbar sympathectomy. This apparently uncommon procedure is not recommended by any doctors in the New Orleans area other than Dr. Watermeier and his partners.

Dr. Oliver Sanders, petitioner's treating psychiatrist, admitted that petitioner's anxiety, chronic pain syndrome and depression could be attributed to his deteriorating physical condition and extensive medical treatment.

On January 20, 22 and 23, and February 2, 3, 5, 6 and 9, 1987, a trial on the issue of damages was held before the Honorable Henry A. Mentz, Jr. of the United States District Court for the Eastern District of Louisiana pursuant to the court's admiralty jurisdiction, 28 U.S.C. § 1333. Following submission of post-trial memoranda by all parties addressing the issue of causation, the trial court found that petitioners had failed to sustain their burden of proof on causation. The United States Court of Appeals for the Fifth Circuit affirmed the trial court's opinion by way of its summary calendar on April 18, 1988, and subsequently denied petitioners' Petition for Rehearing En Banc.

## SUMMARY OF ARGUMENT

These are no "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules which would require the Court to grant review on a writ of certiorari. While petitioners argue that they presented uncontradicted medical evidence that Mr. Fournier suffered disabling psychiatric injuries, it is clear that the trial court's decision was based on its finding, properly supported by the evidence, that petitioners failed to sustain their burden of proof on the issue of causation. The great weight of evidence, and that accepted by the trial court, overwhelmingly reflected that petitioner did not undergo a traumatic event. This evidence, along with petitioner's lack of credibility, supports the finding of the trial court that petitioner failed to establish the vital causative link between the helicopter emergency landing and his psychiatric problems. The same evidence establishes that the Court of Appeals properly affirmed the finding of the lower court since there was no violation of the "clearly erroneous" standard.

Further, it is apparent from a review of the rules at issue that the Fifth Circuit Court of Appeals Internal Operating Procedures do not provide a more narrow entitlement to rehearing en banc than Federal Rule of Appellate Procedure 35(a). Both standards provide for the same limited entitlement to rehearing en banc and simply complement, rather than contradict one another.

## ARGUMENT

### A. There Are No "Special And Important Reasons" Under Rule 17 For Review On Writ Of Certiorari Where Dismissal Of Petitioners' Claims Was Not Contrary To Established Law And Affirmance Did Not Violate The Clearly Erroneous Standard.

Petitioners seek a writ of certiorari arguing that they presented uncontradicted medical evidence that Mr. Fournier suffered disabling psychiatric injuries. Unfortunately, petitioners' argument overlooks the obvious —the trial court's dismissal was based on its finding, supported by the evidence, that petitioners failed to sustain their burden of proof on the issue of causation. There is no legal precedent of this Court or any other which suggests that a plaintiff is entitled to damages if he fails to establish a causal link between his injuries and the events sued upon. Quite to the contrary, the plaintiff bears the burden of establishing the vital link of causation between the incident and his injury. *Restatement of Torts Second* § 433B (1964); *See, Herrmann v. Nicor Marine, Inc.*, 664 F. Supp. 241 (E.D. La. 1985).

As determined by the lower courts, petitioners herein failed to carry their burden of proving by a preponderance of the evidence that the conduct of the respondents was a substantial factor in bringing about their harm. Both the work history of Fournier following the emergency landing and the testimony of petitioner's own doctor support the conclusion that Fournier's physical

injuries are unrelated to the helicopter incident. Dr. Isadore Brickman, the physician who performed petitioner's most recent operation, confirmed the testimony of Dr. Richard Levy, respondents' expert neurologist, that extensive trauma is not a prerequisite for the physical injuries sustained by Fournier.

Like petitioner's deteriorating physical condition, his psychiatric condition was attributed to the extensive medical treatment he had undergone. The trial court recognized that since his initial surgery, Fournier's mental condition along with his physical condition had seriously deteriorated. The trial testimony of Dr. Sanders, petitioner's treating psychiatrist, confirmed that petitioner's anxiety was related to his deteriorating physical condition and that his chronic pain sydrome and depression related to his orthopaedic problems and probable nerve injury.

Although Dr. Sanders attributed some anxiety and depression to the helicopter incident, this diagnosis was based entirely on the representations of the petitioner. Dr. Sanders testified that during his initial examination, he obtained a history from Fournier of a helicopter crash in bad weather into rough seas. Fournier reported to Dr. Sanders that the helicopter fell 800 feet into the water after which time he was "beaten up" for two hours in the water. Accordingly, the validity of Dr. Sanders' diagnosis, like the entirety of petitioner's case, is completely dependent on petitioner's credibility.

The sole basis for any of the evidence presented by petitioner in support of his claim of disabling injury was the word of petitioner himself. After having the opportunity to observe the witnesses present at trial and to balance the evidence presented, the trial court afforded little credence to the testimony of Fournier. Clearly, the Fifth Circuit was correct in giving great deference to the trial court's ability to evaluate the credibility of witnesses. Fed. R. Civ. P. 52(a); *Anderson v. City of Bes-*

*semer City, N.C.*, 470 U.S. 564, 573 (1985); *Gilmore v. Waterman Steamship Corp.*, 790 F.2d 1244 (5th Cir. 1986); *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716 (8th Cir. 1985). Although this Court, like the appellate court below, does not have the benefit of personal observation in assessing Mr. Fournier's credibility, the record alone evidences the many direct contradictions between petitioner's testimony and that of the other witnesses, including those who testified during petitioner's own case-in-chief.

Nowhere is petitioner's testimony more at odds with the balance of the evidence than in regard to the nature of the emergency landing and subsequent time spent awaiting rescue. Quite simply, the preponderance of the evidence does not support a finding that the emergency landing episode was of the traumatic nature that petitioner represented to Dr. Sanders and this Court. Fournier has characterized the incident as a free fall of the helicopter from an altitude of approximately 800 feet, a violent crash into the sea, and a subsequent period of two hours aboard the aircraft during which he was constantly thrown and jerked about. However, this account is drastically different from the descriptions given by his fellow passenger and the helicopter pilot. The pilot, Ellis Blinsky, testified that when the engine failed, he immediately entered autorotation, maintaining control over the aircraft, and successfully landed in the Gulf with the pontoons inflated. Mr. LeBlanc, who sat in the rear of the helicopter, confirmed that the pilot maintained control over the aircraft during the entire descent and then simply "set it down in the water." Clearly these accounts more closely comport with the evidence showing that the other two occupants of the aircraft were not injured and that the aircraft itself was not damaged on landing.

Further, neither Blinsky nor LeBlanc corroborated Fournier's testimony that the aircraft was tossed about in the seas after coming to rest on the water. While

Fournier claimed that the pilot had trouble controlling the aircraft, LeBlanc testified that he was relieved when he saw how well the pilot maintained control of the aircraft while in the water. Pilot Blinsky also described the time spent in the water as calm, with the helicopter riding the waves and no violent motion to the passengers. In contrast to the accounts of Blinsky and LeBlanc, petitioner's description portrayed the aircraft as being "beaten" by the waves, almost causing it to turn over at one point, while the occupants were thrown around inside. Again, the trial court considered the testimony of Blinsky and LeBlanc to be more plausible than that of Fournier, finding that the helicopter "rode with the waves."

Although Fournier claims that his ordeal continued after the rescue boat arrived, there is nothing in evidence, other than his own testimony, to support this contention. To the contrary, there are several indications that Fournier is again exaggerating his difficulty. Mr. LeBlanc testified that other than one occasion when Fournier went into the water, he did not recall the petitioner wheezing or coughing. Pilot Blinsky asked petitioner both while in the aircraft and on the rescue boat if he was injured and petitioner said, "no." While Fournier testified at trial that he was struck by the helicopter numerous times while in the water, Dr. J.T. Kennedy, the emergency room physician at Abbeville General Hospital reported that petitioner responded negatively when asked if he had any injuries.

Obviously, the lower courts' findings reflect an acceptance of the testimony of Blinsky and LeBlanc regarding the nature of the events which petitioner contends led to severe and disabling psychiatric injuries. It is well-settled that this Court gives great weight to findings of fact made by the district court and approved by the Court of Appeals. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed. 2d 70 (1984).

Here, both the findings of the lower courts and the evidence in the record amply support the rejection of petitioner's questionable claims of psychiatric injury. Also dubious are petitioner's claims that the emergency landing induced a chronic fear of flying. It is difficult to reconcile this claimed fear of flying with the undisputed fact that Fournier continued to fly in helicopters for a long period of time following the incident.

Petitioners' contentions that the lower courts ignored the evidence of psychiatric injury are completely unfounded. There is absolutely *no* indication that the courts did not consider the evidence relating to petitioner's psychiatric injury, merely that they rejected petitioner's evidence based on their determination that it was not credible.

Further, petitioners' attempt to bolster their argument with the affidavit of Dr. Oliver Sanders, which was first attached to their Motion for Rehearing En Banc, is inappropriate and may not be considered by this Court. In resolving a case on appeal, reference to matters not in the record is improper and attachments to briefs do not suffice. *GHR Energy Corp. v. Crispin Company Ltd.*, 791 F.2d 1200 (5th Cir. 1986); *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976); *Rebuck v. Vogel*, 713 F.2d 484, 486 (8th Cir. 1983). Affidavits outside the record cannot be considered on appeal. *Scarborough v. Kellum*, 525 F.2d 931, 933 (5th Cir. 1976).

Despite petitioners' contentions to the contrary, the trial court's dismissal was not contrary to established law and the appellate court's affirmance was not violative of the clearly erroneous standard. Thus, there are no "special and important reasons" within the meaning of Rule 17 of the Supreme Court Rules which would require the Court to grant review on a writ of certiorari.

**B. The Internal Operating Procedures Of The Fifth Circuit Court Of Appeal Do Not Set Forth A Narrower Entitlement To Rehearing En Banc Than Federal Rule Of Appellate Procedure 35(a).**

Petitioners argue that the Fifth Circuit's Internal Operating Procedure provide a more limited entitlement to rehearing en banc than Federal Rule of Appellate Procedure 35(a). However, a brief review of these rules reveals that there is no such inconsistency. Fed. R. App. P. 35(a) dictates that a rehearing en banc is appropriate: "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." In conjunction with this rule, the Fifth Circuit has devised its own Internal Operating Procedure which provides that:

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or errors asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

When both are viewed in their entirety, there is simply no inconsistency and thus, the Fifth Circuit has not violated its rulemaking authority.

Both the general appellate rules and the Fifth Circuit's local rules recognize that a rehearing is not favored and should be ordered only in exceptional circumstances. Fed. R. App. P. 35(a); Local Rules of Fifth Circuit 35.1. In fact, the Fifth Circuit notes that "[s]uggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit."

Through its Internal Operating Procedures, the Fifth Circuit has merely devised its own administrative machinery through which to exercise its en banc power. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953). Clearly, this rule is a proper exercise of the wide discretion allotted to the Circuit courts in establishing procedures that promote sparing use of en banc power.

## CONCLUSION

There are simply no compelling reasons for this Court to grant review on the writ of certiorari in this case. Petitioners simply failed to establish a causal link between alleged injuries and the events sued upon. Further, the Fifth Circuit has adopted appropriate procedures for adjudging a party's entitlement to rehearing en banc and its procedures do not conflict with Federal Rule of Appellate Procedure 35(a). Accordingly, the writ of certiorari should be denied.

Respectfully submitted,

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